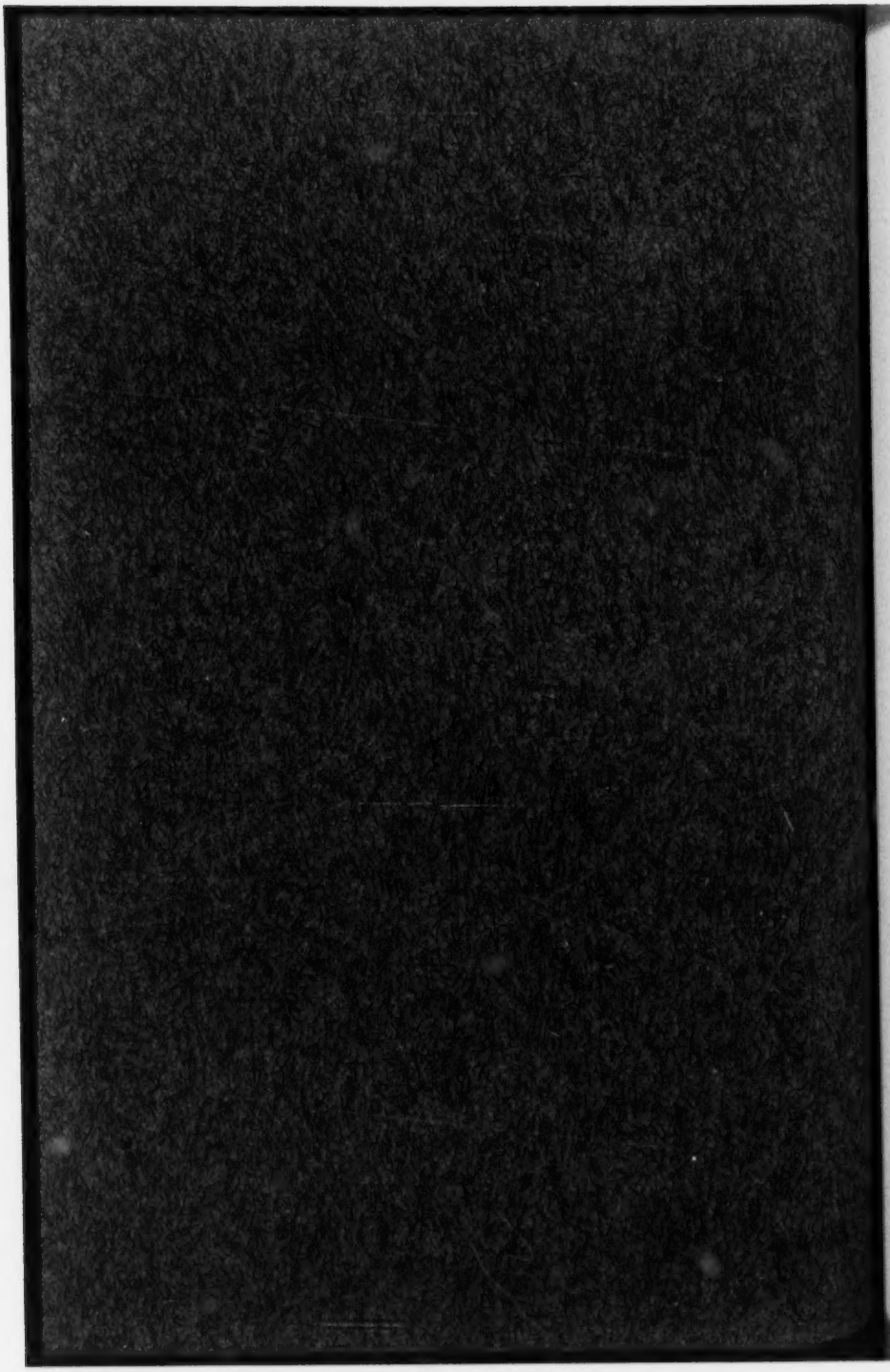

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 238

SELDON R. GLENN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

ELEANOR BEARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF PETITIONER FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Comes now the petitioner, Seldon R. Glenn, Collector of Internal Revenue, by the Solicitor General, and respectfully prays leave to file the attached petition for rehearing in this case.

CHARLES FAHY,
Solicitor General.

PETITION FOR REHEARING

Comes now the petitioner in the above cause, Seldon R. Glenn, Collector of Internal Revenue, by the Solicitor General, and respectfully prays that his petition for a writ of certiorari which was filed on July 7, 1944, and denied on October 9,

1944, be reconsidered and that the writ then sought to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered on March 20, 1944, be now issued.[1]

REASONS FOR ALLOWING THE PETITION FOR REHEARING AND GRANTING THE WRIT

1. When the petition for a writ of certiorari which the Court is asked to reconsider was presented it was pointed out that the decision below appeared to be erroneous in that its rationale seemed to bear no relationship to the nature or purposes of the Social Security Act; that the question was a fundamental one; and that until set at rest by the authority of a decision of this Court the question would present formidable difficulties in the proper administration of the law. All these considerations remain substantially unchanged.[2]

[1] Following this Court's action in denying the original petition for certiorari the amount of the judgment was paid by the petitioner to the respondent, and on February 19, 1945, a formal order reflecting the fact of such payment was entered in the district court at the instance of the respondent. However, we believe it clear that payment of a money judgment does not preclude the judgment debtor from pursuing appropriate proceedings to secure reversal of the judgment and recovery of the money paid. *Dakota County* v. *Glidden*, 113 U. S. 222, 224; *O'Hara* v. *McConnell*, 93 U. S. 150, 154; *Josevig-Kennecott Copper Co.* v. *James F. Howarth Co.*, 261 Fed. 567.

[2] After the Court's denial of certiorari, the Bureau of Internal Revenue, in an effort to adjust its position to the realities of the situation, issued a ruling accepting the decision as controlling in all cases involving substantially the same cir-

2. On November 13, 1944, the Circuit Court of Appeals for the Fourth Circuit rendered a decision in *United States* v. *Vogue, Inc.*, 145 F. 2d 609 (C. C. A. 4th), which is in substantial conflict with the decision of the court below in the instant case.

Factually the two cases are unlike in some respects. But the dissimilarities do not serve to avoid the conflict since it is one which involves opposing principles which, if applied to the same facts, would lead to different results.

Historically the conflict traces its genesis to a decision of the court below which arose under the Fair Labor Standards Act. *Walling* v. *American Needlecrafts*, 139 F. 2d 60 (C. C. A. 6th). In that case an employer was contending that it was not liable for non-compliance with the wage

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cumstances. Mim. 5763, 1944–22 Int. Rev. Bull. 40–41. Since the facts—as to the crucial question of control over actual performance of the work—are reasonably typical of any homeworker case, the ruling is virtually equivalent to a holding that no homeworker is entitled to the coverage of the Act. On its face, a ruling of such broad import might appear to eliminate, so far as homeworkers are concerned, the administrative difficulties which result from doubt as to the scope of the Act. But such is not the case, since a ruling favorable to the employer under the taxing provisions of the Act is unfavorable to his workers under the benefit provisions, and at the same time is not binding on the latter. Thus, the administrative problems are not disposed of by conceding the employers' claims, but are merely shifted from the Treasury to the Social Security Board. Cf. *Carroll* v. *Social Security Board*, 128 F. 2d 876 (C. C. A. 7th); *LaLone* v. *United States*, 57 F. Supp. 947 (E. D. Wash.).

and hour provisions of the Act in connection with its employment of homeworkers because such persons were not "employees" within the common law concept of the term, as exemplified by the so-called "control test." The court rejected the contention. Rather, it held, in substance, that the Fair Labor Standards Act was one of a class of regulatory and remedial statutes designed to implement a public social or economic policy unknown to the common law, and that taken as a whole the language, purposes and history of the Act indicated that Congress did not intend to lend its encouragement to a return of the sweat shop system by permitting employers to take advantage of supposed and irrelevant common law distinctions between home and factory workers as a basis for shedding the economic and social responsibilities which prompted the legislation.

Because the *Needlecrafts* case and the present case are indistinguishable on their facts[3] and issues, and because the Social Security Act was intended to implement the same Congressional policy which supported the rationale of the *Needlecrafts* case, the Government considered it controlling in the present case and so urged in the

[3] When the case was argued orally the court below stated that it was of the impression that the facts in the *Beard* and *Needlecrafts* cases were alike. When it was agreed by opposing counsel that such was the case, the court asked Government counsel to refrain from making a statement of the facts in the present case since the court was familiar with the facts of the *Needlecrafts* case.

court below. See also, *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111. The court, however, refused to follow the *Needlecrafts* case, but accepted instead the precise contentions which it previously had rejected. To support the change in its position, the court, while referring to certain aspects of the language and legislative history of the Fair Labor Standards Act which it found lacking with respect to the Social Security Act, distinguished the cases primarily on the basis of its understanding of the Treasury Regulations issued in connection with the latter Act. From these Regulations it concluded that the so-called "common law control test" furnished the proper basis for decision. The court pointed to nothing in the language, purposes or history of the Social Security Act which would have precluded the application of the principles of the *Needlecrafts* decision.

After the decision below, and after this Court's decision in the *Hearst* case, the question arose in the Circuit Court of Appeals for the Fourth Circuit. *United States* v. *Vogue, Inc., supra.* There, again, the Government relied upon the principles of the *Needlecrafts* decision, supported by the similar principles of the *Hearst* decision, and the taxpayer, again, relied upon the common law "control test" of the decision below. Although the case arose under the Social Security Act and the language, history and regulations which the court below had thought controlling in this case were unchanged, the Circuit Court

of Appeals for the Fourth Circuit expressly refused to rest its decision on the *Beard* rationale but applied the opposing principles of the *Hearst* and *Needlecrafts* decisions. See also, *LaLone* v. *United States, supra; Nevins, Inc.* v. *Rothensies* (E. D. Pa.), decided January 5, 1945 (1 C. C. H. Unemployment Service, par. 9167).

Thus, since the conflicting results of the *Needlecrafts* and *Beard* cases can be reconciled only on the basis of statutory distinctions—which distinctions do not exist between the *Beard* and *Vogue* cases—the acceptance of the *Needlecrafts* decision by the Circuit Court of Appeals for the Fourth Circuit makes it clear that that court, if faced with the facts here involved, would reach a result contrary to that reached by the court below.

Rehearing is therefore sought not only because we believe that the question remains fundamentally an important one but in the hope that this Court may resolve the conflict now existing between the circuits.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,
Solicitor General.

MARCH 1945.

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(37)

No. 238.

IN THE

Supreme Court of the United States

October Term, 1944.

SELDEN R. GLENN, Collector of Internal Revenue, - - - - - - - - - Petitioner,

versus

ELEANOR BEARD.

BRIEF IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND IN OPPOSITION TO THE PETITION FOR REHEARING.

ALLEN P. DODD,
Attorney for Respondent.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1944.

No. 238.

SELDON R. GLENN, COLLECTOR OF INTERNAL REVENUE, - - - - - - - - - *Petitioner,*

v.

ELEANOR BEARD.

BRIEF IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND IN OPPOSITION TO THE PETITION FOR REHEARING.

The above case makes its appearance again in this Court on the same record. The petition for writ of certiorari was filed July 7, 1944, and denied October 9th following. On February 19, 1945, the judgment appealed from, together with interest and taxable cost, was paid.

The motion for leave to file the petition for rehearing was served on counsel for respondent on the 19th of March, 1945.

It would seem that a statement of the foregoing steps, in the light of the rules of this court, ought of

itself to warrant the denial of the motion for leave to file the petition for rehearing and deny the petition.

There is no statement made in the petition or in the motion that takes this case out of the rules of this court, as we see and understand those rules. Rule 33 of the rules of this court provides:

> "A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session; and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines."

For the foregoing reasons, the respondent respectfully objects to the motion for leave and asks that it be overruled.

THE PETITION.

The only fact set forth in the petition for rehearing that was not covered by the petition for writ of certiorari is one of event. It happened that the Circuit Court of Appeals for the Fourth Circuit, on November 13, 1944, decided *U. S.* v. *Vogue, Inc.*, 145 F. (2d) 609, and it is now claimed that the opinion in that case is in conflict with the opinion of the Sixth Circuit

Court of Appeals in this case. It is admitted in the petition that there is a factual difference between the two cases, and we submit that upon the record in the Vogue case there is quite a wide distinction between those facts and the record in this case, even if the opinion in the Vogue case could be used at all in this case.

Mr. Justice Parker, who delivered the opinion in the Vogue case, after stating the facts, held:

> "On the above facts, we think it perfectly clear that Mrs. Fulton and Mrs. Woodfin were not independent contractors, but employees within any fair meaning of that term and certainly within the meaning of the Social Security Act."

In other words, that case turned upon the question as to whether the facts warranted a finding that the individuals involved were or were not independent contractors. The facts briefly summarized by Mr. Justice Parker clearly distinguish that case from this case, for he said:

> "They were engaged in work which was an important part of the work of plaintiff's store; they occupied premises over which plaintiff exercised control; they were subject to call by plaintiff; they did work which plaintiff gave them to do; they were paid for their work by plaintiff; and when they worked for a weekly wage and were unquestionably subject to plaintiff's orders they handled the work in precisely the same way as when working on the piece work basis."

The homeworkers in this case, and at the times they were contracting with the respondent, were contracting with seven other industries, and

(a) They didn't occupy premises over which respondent exercised control;

(b) They were not subject to call by respondent;

(c) Each piece of work was by special contract, and such as they were willing to take;

(d) They were paid in accordance with the contract;

(e) They never worked for a weekly wage at any time for respondent; and

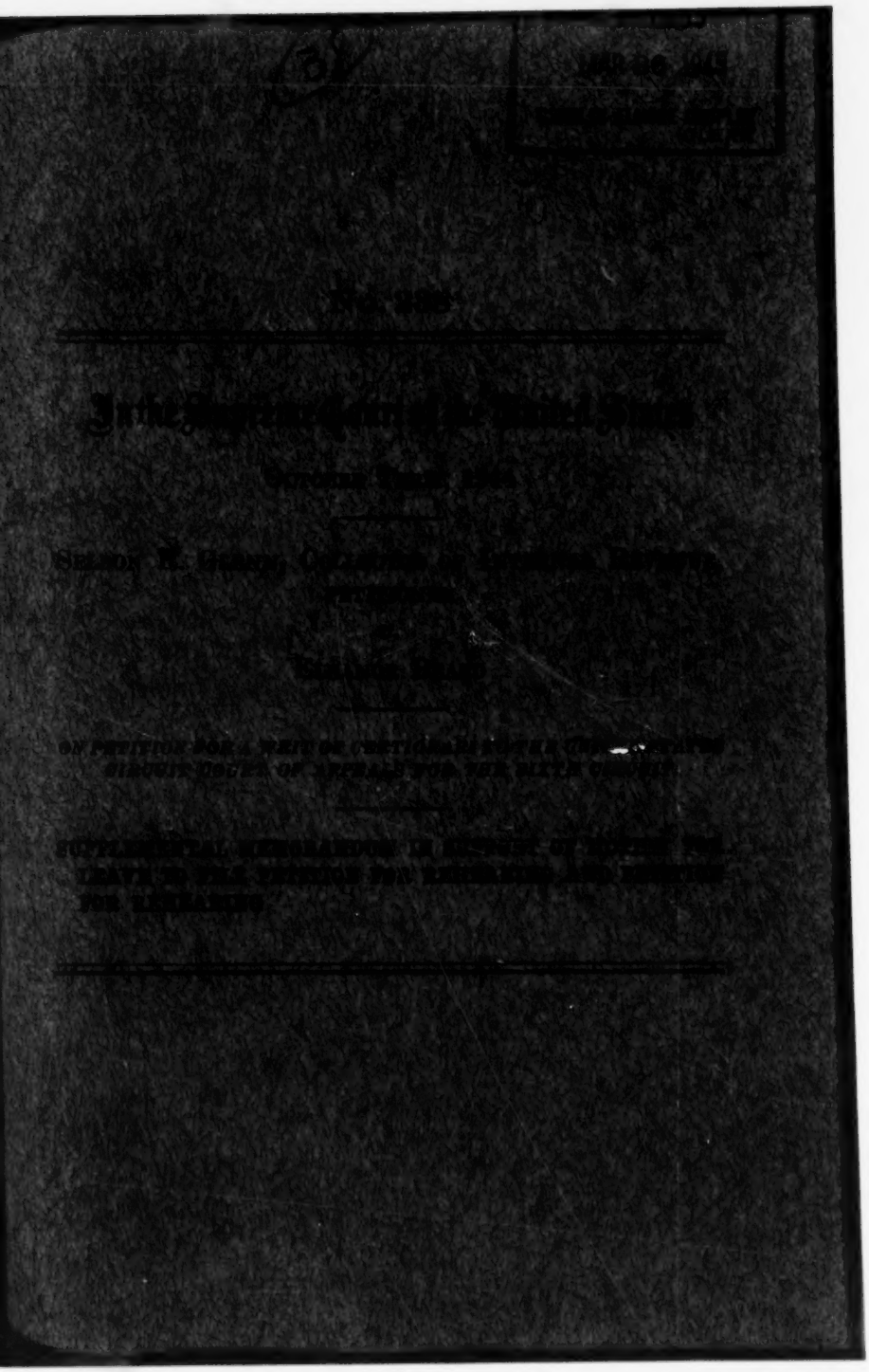
(f) Contracts were not awarded by custom.

There are many other features disclosed by this record that distinguish this case from the Vogue case, *supra.*

We submit that there was no basis for the writ of certiorari and certainly this petition for rehearing adds nothing of merit to the original petition, and accordingly is without merit.

Respectfully submitted,

ALLEN P. DODD,
Attorney for Respondent.



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v.

ELEANOR BEARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING

Since the filing of the petitioner's motion for leave to file petition for rehearing, the Court of Appeals for the District of Columbia has passed upon the question here involved. *Raymond J. Grace* v. *Magruder,* decided March 19, 1945, not yet reported. A copy of the opinion is annexed.

As was shown in our petition for rehearing, the decision in *United States* v. *Vogue, Inc.,* 145 F. 2d 609 (C. C. A. 4th), was based upon principles of law which are in such conflict with the principles which supply

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the rule of decision below as to require contrary results upon the same facts. See also, *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111. The decision in the *Grace* case is based upon precisely the same principles as those of the *Vogue* case. Again the decision of the court below in *Walling* v. *American Needlecrafts,* 139 F. 2d 60—rather than its decision in the instant case—was accepted as representing the proper rule for application in cases involving the meaning of the term "employee", as used in legislation of this class.

The conflict which existed between the law of the Sixth Circuit and that of the Fourth Circuit is now extended to include the District of Columbia.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

MARCH, 1945.